No. 80-1877

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IN THE

Supreme Court of the United States

October Term, 1980

FELICE CASSESSE,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

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Question Presented for Review

Are the petitioner's federal constitutional rights of due process and protection against double jeopardy and cruel and unusual punishment abridged by the combined effect of the New York statutory scheme under sections 265.02 (1) and (4) and 70.06 of the New York State Penal Law, which in effect make a misdemeanor crime a felony because of a prior criminal conviction and thereafter subject the petitioner to increased punishment as a second felony offender based upon the same prior criminal conviction?

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To the Honorable The Chief Justice, and Associate Justices of the Supreme Court of the United States:

Introduction

This is a brief in behalf of the respondent in opposition to a petition for a writ of *certiorari* to an intermediate appellate court of the State of New York, the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department.

Opinion Below

The opinion of the Honorable Justice John J. Leahy of the New York State Supreme Court denying the petitioner's motion to declare the New York statutes unconstitutional as applicable to the petitioner is not officially reported. The Appellate Division's affirmance of the petitioner's conviction was without opinion. The New York Court of Appeals denied leave to appeal. The Appellate Division and New York Court of Appeals' orders have not yet been officially reported.

Jurisdiction

The jurisdiction of this Court to review by way of *certiorari* is invoked under 28 U.S.C. §1257, subd. 3, and Rule 19 (1) (a) of the Rules of this Court.

ARGUMENT

The petition should be denied because the appeal below was correctly denied.

Petitioner contends that the combination of two New York statutes, sections 265.02 (1) and (4) and 70.06 of the Penal Law, deprive a defendant of due process and violate the constitutional protections against double jeopardy and cruel and unusual punishment. He asserts that this is so because, in his case, a prior felony conviction was used both to raise the possession of a weapon from a misdemeanor to a felony and as the basis for sentencing him as a second felony offender. This position is without merit.

Under New York Law, possession of a firearm is a misdemeanor, the maximum sentence being one year in jail. Penal Law §§265.01, 70.15. However, when a defendant has been previously convicted of any crime, possession of a firearm constitutes a class D felony, the maximum term for which is seven years in prison. Penal Law §§265.02 (1) and (4), 70.00. Such a person may be sentenced as a second felony offender when he has previously, within ten years of the present conviction, been sentenced in any jurisdiction for an offense for which a term of imprisonment of more than one year was authorized and is authorized in New York. Penal Law §70.06.

It is well settled that the constitutionality of the practice of inflicting severer criminal penalties upon habitual offenders is no longer open to serious challenge. *Ogler* v. *Boles,* 368 U.S. 448, 451 (1962).

In the instant case, the level of the offense was raised because petitioner was previously convicted of a crime, which may be either a felony or a misdemeanor. Because that crime was a felony, the sentence was enhanced pursuant to New York Penal Law §70.06.

Whalen v. *United States,* 445 U.S. 684 (1980), cited by petitioner, is not applicable to the instant case. Whereas in that case consecutive sentences were imposed for offenses arising from a single criminal episode and this was found to be improper, in the instant case a single sentence was imposed upon petitioner. This sentence was enhanced because petitioner was previously convicted of a felony.

Petitioner in his papers cites *Busic* v. *United States*, —— U.S. ——, 64 L. Ed. 2d 381, 100 S. Ct. 1432 (1980) for the proposition that prosecution and enhanced sentencing under one statute is not permissible where the predicate felony statute contains its own enhancement provision. This, however, is inapposite to the instant case wherein the charge is enhanced by the fact that a defendant was previously convicted of a crime (felony or misdemeanor), and sentence was enhanced by the fact that he had been sentenced for a felony within ten years of the present conviction.

The New York statutory scheme is rational in that the state has a greater concern in keeping illegal weapons out of the hands of convicted criminals than from the hands of other persons, and an even greater concern in keeping them out of the hands of convicted felons than from persons convicted of lesser offenses. Therefore, it is clear that petitioner is incorrect in his claim that the New York statutory provisions denied him due process or violated his constitutional protections against double jeopardy and cruel and unusual punishment.

Conclusion

The petition for a writ of *certiorari* should be denied in all respects.

Respectfully submitted,

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